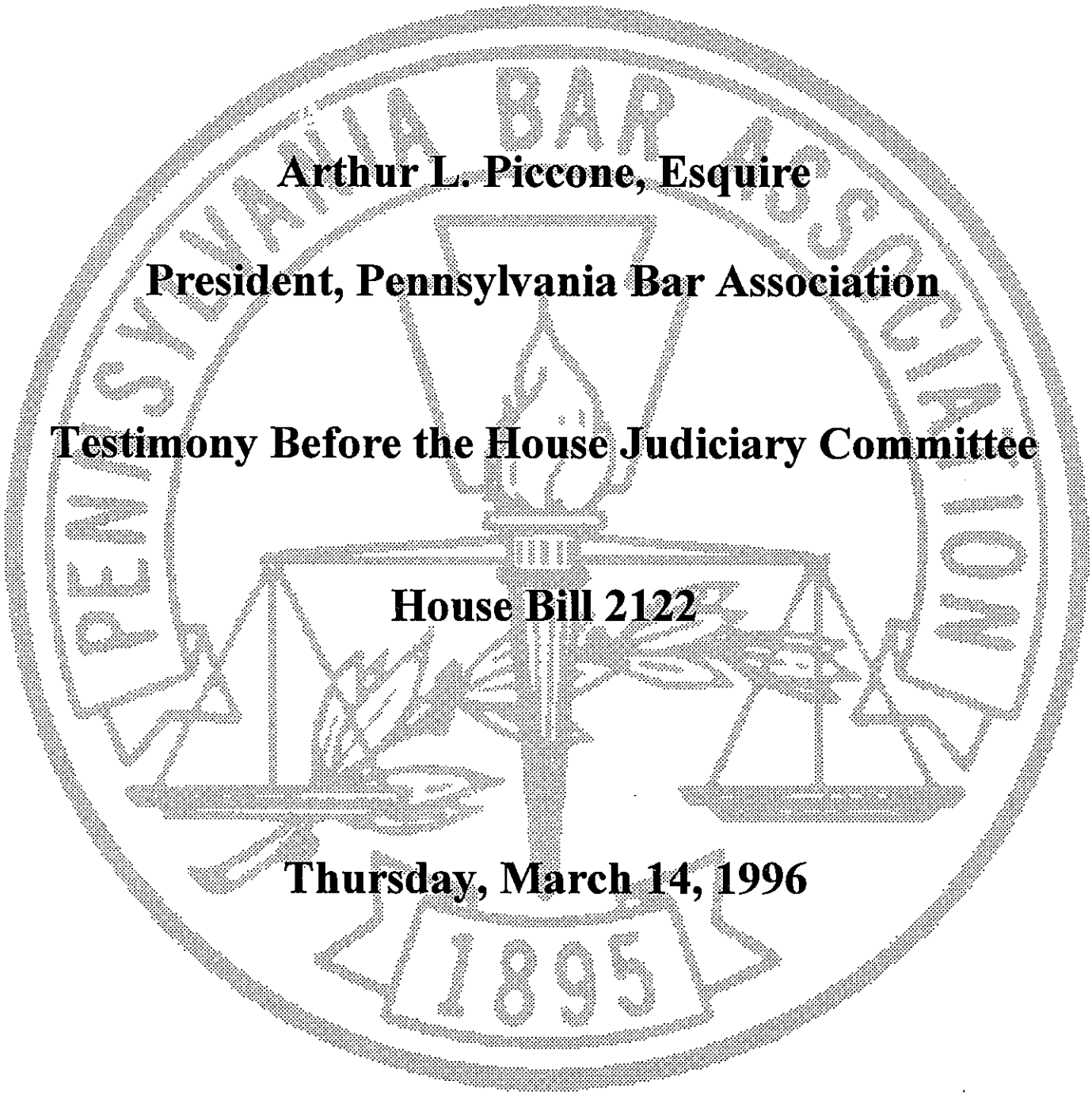

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Testimony Before the House Judiciary Committee

House Bill 2122

Thursday, March 14, 1996

Good morning, Chairman Gannon and members of the House Judiciary Committee. I'm Arthur Piccone, president of the Pennsylvania Bar Association. I'm pleased to have been invited to present testimony on House Bill 2122 to this distinguished committee, and I applaud the chairman and the committee for calling this hearing. With me today is Carol Nelson Shepherd, chair of the PBA Civil Litigation Section, which has worked extremely hard and diligently in formulating the Association's position on this legislation.

The Civil Litigation Section is fortunate to have the talent and expertise of members from both the plaintiff and the defense bars. However, despite historical philosophical and economic differences, both sides of the legal aisle became of one mind in their opposition to this bill.

Yes, after intense scrutiny and debate by some of the state's very finest trial and defense lawyers, we were able not only to reach a consensus on our opposition to the bill itself, but also to stand united in our belief that House Bill 2122 is a dangerous piece of legislation designed to whittle away the rights of our citizens to seek redress through the judicial system, while providing substantial protections to physicians, hospitals and their insurers that are not afforded to similarly situated tortfeasors. This bill is a significant departure from the time- honored legal principle of fairness on which our system is built and that which is frequently criticized by self-serving sources. We strongly urge you to not radically change these principles and to not abandon longstanding precedent in order to placate an angry, frightened medical profession.

As lawyers, we took an oath to defend the Constitutional rights of citizens. As lawyers, we cannot watch special interest groups run roughshod over the Constitution. As lawyers, we must not allow the "little guy" to become the innocent victim in a battle being waged by the medical and insurance communities simply because they do not want to be held accountable for wrongdoing. We cannot support legislation that will do little more than establish a caste system in which a few controls the many, a system that treats people unfairly and is completely contrary to the principles of a democratic society.

The proponents of House Bill 2122 don't want to talk about Constitutional rights, patients' rights and the like. Instead, they want to send up a smoke screen by arguing that the tort system adds dramatic expense to health care. They want you to believe that high insurance premiums and unwarranted litigation have resulted from exorbitant verdicts.

The fact of the matter is that today's civil jury verdicts are not excessive. For example, a July 1995 report from the U.S. Department of Justice entitled "Civil Jury Cases and Verdicts in Large Counties" showed that the median total award for a plaintiff over a twelve-month period was $52,000 -- not exactly a windfall by any means. Furthermore, a November 1992 study entitled "The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims" suggested that unjustified payments to plaintiffs are uncommon.

Yet, they neglect to mention that these awards have been awarded by that time-honored American tradition called a **JURY**, composed of fair, honest and hardworking people who believe in the

justice system and the citizens it was designed to protect.

A 1990 Harvard Medical Practice Study has shown that only one out of eight malpractice victims ever files a claim. An April 1995 Department of Justice report entitled "Tort Cases in Large Counties" told of a 1992 survey of 75 of the nation's largest counties, including Philadelphia. It showed that:

- medical malpractice cases represented only 4.9 percent of all tort cases;
- the number of tort cases being filed has been relatively the same since 1986;
- the average amount of time needed to process a medical malpractice case was 26.4 months.

Are these numbers excessive in light of the fact that we are talking about the health care, treatment and lives of our citizens? We think not.

Moreover, I think it is important to note that a substantial portion of litigation is made up of commercial cases having nothing to do with injury.

The supporters of the bill want to frighten people into believing that if they exercise their constitutional rights and seek redress through the judicial system, doctors and hospitals will refuse to treat them. They allege that the courts are being tied up by abusers of the system and greedy lawyers whose stall tactics waste taxpayers' money.

Proponents of House Bill 2122 also would have us believe that there is a crisis in medical malpractice insurance costs. But Pennsylvania's Insurance Commissioner Linda Kaiser has said that our insurance rates are competitive with other states. In fact, we are in the lowest one-third of the states relative to professional liability insurance rates, thus showing us that the so-called "tort reform" enacted in other states has had relatively little effect on lowering insurance costs.

On September 20, 1995, testifying before the Senate Banking and Insurance Committee, CAT Fund Director John Reed alluded to the fact that despite New Jersey's recently enacted legislation intending to limit malpractice awards, Pennsylvania's insurance rates are significantly lower for virtually every category of health care provider.

The impetus for this legislation is apparently the recent Catastrophe Loss Fund surcharge. This considerable surcharge is a result of a number of factors, not one of which is the current legal system. First there were artificially low premiums affecting the surcharge, due in part to an existing backlog of cases in Philadelphia. Then the implementation of the "Day Backward" program in Philadelphia resulted in a large number of cases being suddenly concluded. This, in turn, overtaxed the Fund's reserves, which created a shortfall in available dollars for payment, thereby requiring a surcharge this year. Additionally, the 1984-85 Hofflander-Nye Study found that there is approximately a 10-year cyclical nature of the insurance industry in this area. It is this cycle that has given the perception of a crisis. Moreover, when you take all these issues

together, one can see that the so-called problem has nothing to do with nor was it caused by an increase in the medical malpractice claims or "exorbitant" verdicts.

We emphatically disagree with the sponsor's assumption that today's so-called crisis was caused by legal principles that have been in effect for decades. In fact, according to figures used in a February 1992 report from the General Accounting Office entitled "Health Care Spending - Nonpolicy Factors Account for Most State Differences" personal health care spending per capita approximately doubled throughout the United States from 1982 to 1990 **regardless** of whether a state had enacted "tort reform" measures. Furthermore, the three states with percentage increases estimated to be slightly lower than average (Arkansas, Kentucky and Mississippi) had NO caps on damages in medical malpractice cases. Conversely, Alabama, which had a slightly higher percentage increase, had a cap on damages. These findings are mirrored by a March 1993 study from the Coalition for Consumer Rights entitled "False Claims: The Relationship Between Medical Malpractice "Reforms" and Health Care Costs," that stated there is "no indication that enacting major 'tort reforms' is positively correlated with lower health care costs."

The proposed legislation completely fails to address these and other issues relating to insurance availability and cost. The solution to the perceived problem, if anything other than time, lies not with so-called tort reform, but with the insurance industry and its relationship with the Catastrophe Loss Fund in Pennsylvania. Separate legislation has been proposed to alter the relationship between the primary insurance carriers and the Catastrophe Loss Fund. This legislation may be a more appropriate vehicle to address costs consideration for medical negligence insurance instead of House Bill 2122's tinkering with citizens' rights.

House Bill 2122 in its current form is replete with problems that would undermine the fundamental fairness of our litigation system, a system that currently serves as a deterrent to those who would place others in danger or cause them harm. While I will not attempt to address all of the bill's flaws, I feel compelled to point out problems with the following provisions.

Informed Consent -- Under present law, before undergoing surgery, a patient is entitled to be advised of any risk or alternative that a reasonable person would want to know. This doctrine, known as the "prudent patient" standard, has long been Pennsylvania law. House Bill 2122 eliminates this protection and instead allows the medical profession to define the standard for what patients should know. A physician would be required to obtain informed consent only prior to a "major invasive procedure," except in an emergency situation or where the court deems appropriate. If this provision is enacted, let's not fool ourselves and call it "informed consent." Instead, let's call it censored consent.

evasive

Punitive Damage -- Under House Bill 2122, the standard of proof for punitive damages would become "clear and convincing." Under this new standard, one would have to prove that a defendant acted with "evil motive" or a "high disregard for risk." In addition, House Bill 2122 would limit punitive damages to not more than 200 percent of compensatory damages and require bifurcation of the assessment of punitive damages. According to the aforementioned Department

of Justice study, punitive damages were awarded in only 13 out of 403 medical malpractice cases. Since punitive damages rarely are awarded in medical negligence cases, how can such restrictions in appropriate cases be justified?

Collateral Sources -- House Bill 2122 would reverse longstanding common law and would provide for a deduction of any public or group benefits received or to be received by a claimant unless a premium was paid by a claimant, or the benefits were from life insurance, a pension, or a profit-sharing plan. This could have monumental ramifications on cases involving serious injury, difficult liability or limited coverage. How can it be justified that a deduction should be made for future benefits that might be received by the claimant? In certain circumstances this could reduce the amount of the award to little or nothing. Certainly this was not the intent of our civil litigation system to reward the "wrong doer" by lessening what he/she has to pay the victim.

Statute of Limitations -- Again, this bill creates an exception for medical negligence claims. The legislation carves out an exception to the minor's tolling statute, which was enacted in Pennsylvania in 1984, and applies to all other personal injury claims. This bill would require, in cases involving minors under the age of eight, claims to be filed within four years after the parent or guardian knew or should have known of the injury or within four years of the minor's eighth birthday, whichever is earlier. At a time when the legislature is continually attempting to add protections for children, why would anyone want to destroy this existing protection? You want to protect them in child abuse cases by providing a screen that would safeguard them from being affected mentally or emotionally by testimony. Yet, you would deny those same children the right to recover damages from physical injuries. It's inconceivable that you would want that result.

Pre-Treatment Agreement to Arbitrate -- This legislation, as currently drafted, would allow physicians to require their patients, before treatment, to waive the right to a jury trial, which is one of our fundamental rights as Americans. Instead, the patient would have to agree to arbitrate any future claims arising from the treatment. House Bill 2122 would also bind the CAT Fund to such agreements. I cannot overstate the importance of the **guarantee** of the right to a trial by jury to promote fairness and equity. This provision blatantly takes away this right from citizens at a time when they are most vulnerable.

It is surprising that the doctors seek not only to establish for themselves a system that would severely limit a victim's right to redress, but an additional layer of protection, by eliminating the basic right of trial by jury that has been a part of jurisprudence since the Battle of Runnymede.

Frivolous Lawsuits -- As you know, there is a whirlwind of discussion on this subject both in Pennsylvania and nationally. This bill would require a plaintiff's counsel to certify the existence of a pre-suit written expert report and that a "properly qualified" expert has concluded, based upon review, that the case has merit. Under the bill, a Federal Rule 11-type sanction could be brought for using a "not qualified" expert. In addition, the bill seems to provide that if the plaintiff fails to prove a punitive damage claim, the court may impose an "appropriate sanction" upon counsel, which may include a requirement to pay the other party's expenses and attorneys' fees.

Defensive Medicine -- One last point. Throughout these deliberations, you may hear claims that physicians must engage in "defensive medicine" out of fear of suit that drives up the costs of health care and the insurance. Keep in mind that most parties cannot even agree upon the definition. A 1994 study conducted by the U.S. Congress, Office of Technology Assessment entitled, Defensive Medicine and Medical Malpractice found that "only a few clinical situations represent clear cases of wasteful or low-benefit defensive medicine." Well I must say, if the physicians' concern about liability results in more conscientious medical care, then "defensive medicine" is certainly desirable. That is exactly what the system is designed to do.

We realize physicians are upset with the many changes in our society, including the managed care atmosphere that has substantially altered the doctor/patient relationship and fundamentally has transformed the practice of medicine. We also recognize that recent surcharges imposed by the Medical Professional Liability Catastrophic Loss Fund have caused quite a stir. Since doctors cannot change the managed care system which has cut their disposable income, they have turned their frustration to the legal system. Litigation has never reduced the amount of income they earn. So-called tort-reform and more specifically HB 2122 should not be used to correct an **INSURANCE** problem.

Throughout all of your deliberations on House Bill 2122, I ask that you recall the words of a noted statesman, who observed: "The threat of democracy lies . . . not so much in revolutionary change, achieved by force of violence. Its greatest danger comes through the gradual invasion of constitutional rights with acquiescence of an inert people, through failure to discern that constitutional government cannot survive where the rights guaranteed by the Constitution are not safeguarded even to those citizens with whose political and social views the majority may not agree."

If you believe that increased litigation is causing more lawsuits, more verdicts against doctors, and rising insurance costs, then what the doctors and this legislation are saying is that the medical profession is becoming more negligent in its treatment of people. Doctors believe they need "tort reform" to protect themselves. To doctors, tort reform means: 1) reduce my insurance costs; 2) limit the number of lawsuits that can be filed against me; and 3) reduce the amount of money I can be obligated to pay. The net result is a profession, by its own admission, that can only exist by absolving itself of its responsibility and accountability, and as a result, earn more money. That's not tort reform, that's a government bail-out. That's not tort reform, that's government abdicating its responsibility to protect the rights of its people.

In conclusion, may I state again the Pennsylvania Bar Association's strong opposition to any legislation that would deny citizens access to justice and that would carve out special protections for certain groups, at the expense of time-honored legal principles. It is our belief that the so-called problem is one of INSURANCE, not of the legal system and should be treated as such.

For all of the reasons I've outlined, the Pennsylvania Bar Association respectfully urges you to defeat House Bill 2122. The PBA stands ready to assist you in any way you feel is appropriate.

Carol and I would be happy to entertain any questions you may have.

Thank you.